

NOT FOR PUBLICATION

JAN 30 2006

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

DELBERT R. DIMICK,)	
)	Nos. 04-55461, 04-55473, 04-55546
Plaintiff-Appellant /)	
Cross-Appellee,)	D.C. No. CV 01-00680-CJC
)	
v.)	
)	MEMORANDUM*
JOSEPH P. DONAHUE, an)	
individual,)	
)	
Defendant-Appellee /)	
Cross-Appellant.)	
_____)	

Appeal from the United States District Court
for the Central District of California
Cormack J. Carney, District Judge, Presiding

Argued and Submitted December 8, 2005
Pasadena, California

Before: RYMER and WARDLAW, Circuit Judges, and REED,** Senior District
Judge.

Delbert R. Dimick appeals the judgment in his action for breach of fiduciary

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or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Edward C. Reed, Jr., Senior United States District Judge for
the District of Nevada, sitting by designation.

duty and conversion against Joseph P. Donahue, arguing that the district court erred in calculating damages. Donahue cross-appeals on the footing that Dimick's claims were asserted too late. We affirm.

I

None of Donahue's arguments for why Dimick's claims are untimely is persuasive. The court did not clearly err in finding that Dimick's claims did not accrue on January 30, 1996, or that he should have known of his cause of action by then. *See Erlin v. United States*, 364 F.3d 1127, 1130 (9th Cir. 2004) (noting that whether a reasonable person should have known that he had been harmed is reviewed for clear error). Nor did the court abuse its discretion in declining to bar Dimick's action on equitable grounds: by leaving Polyscan, Dimick did not breach a duty of loyalty that affected Donahue's duty to him as a shareholder, and Dimick did not unduly delay in bringing suit once he learned about the Etec transaction. Finally, Donahue's waiver theory fails because Dimick did nothing to secrete himself and Donahue knew where he was. *Cf. Washington ex rel. Burton v. Leyser*, 196 Cal. App. 3d 451 (Cal. Ct. App. 1987).

II

Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93 (1969), upon which Dimick relies, does not compel a different damages calculation given the district court's findings, which we are not firmly convinced are incorrect, that Dimick chose to part company with Polyscan's Arizona venture; that Donahue would not have allocated Etec shares to Dimick in the circumstances; and that the value of Dimick's interest could be fairly compensated based on the fair market value of the shares as of the date of the Etec transaction. *See Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004) (indicating that damage calculations are reviewed for clear error); *see also Labor / Cmty. Strategy Ctr. v. Los Angeles County Metro. Transp. Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001) ("A federal court enjoys broad equitable powers; its choice of equitable remedies is reviewed for an abuse of discretion."). In this context, the court's observation that valuing Dimick's interest as of the date of the action would be speculative, and in effect create a windfall, does not run afoul of *Ahmanson*.

While the court no doubt *could* have determined that some other figure better accounted for the lock-up provisions or the fluctuating market value of Etec stock, it was not *obliged* to. Similarly, while the court *might* have decided to impose a constructive trust, it was not *required* to in light of the equities. *See Lund v. Albrecht*, 936 F.2d 459, 464 (9th Cir. 1991) (indicating that a constructive

trust that disgorges the wrongdoer's profits is an "available" remedy).

Neither can we say that the award was legally insufficient as a remedy for conversion. As the district court explained, the fair market value of Dimick's shares as of the date of conversion – a value on which both parties' experts agreed – compensated Dimick for the detriment suffered because damages in that amount indemnified him for unavoidable loss. *See* CAL. CIV. CODE § 3336 (providing "[t]he value of the property at the time of conversion, with the interest from that time" or "an amount sufficient to indemnify the party injured" for the unavoidable loss caused by the conversion as remedies for conversion). Absent compelling evidence of what Dimick would have done with his stock, it was not clearly erroneous to fix its worth as of the date of conversion. *Cf. Betzer v. Olney*, 14 Cal. App. 2d 53, 61 (1936) (holding that it was manifestly unjust to use the date of conversion to calculate damages where the plaintiff did not desire to sell his stock).

AFFIRMED.